Summary of Comments

BUREAU OF ELDER AND ADULT SERVICES
PROPOSED CHANGES TO POLICY MANUAL

The Bureau of Elder and Adult Services held a public hearing on proposed amendments to Section 71 Certificate of Need for Nursing Facility Level of Care Projects of its Policy Manual on Monday, June 14, 2004, in Conference Room 1A at 442 Civic Center Drive. One individual representing Preti Flaherty attended the meeting but made no comments. The deadline for written comments from the public was 4:00 PM on Thursday, June 24. Two written comments were received by that deadline. The numbering with this list is the key that identifies who made the comments reported below. Comments were made by:

1. First Atlantic Healthcare, Wanda Pelkey
2. Maine Health Care Association, Richard Erb

Comments on proposed amendments to BEAS Policy Manual received before the June 24, 2004 deadline.

1. Section 71.02 (G)- A commenter pointed out that a definition for the capital investment fund was included in our rules but there is no reference to it elsewhere. Also the commenter expressed concerns over the fact that only 12.5% of this fund is available to non-hospital projects. Commenter #2.
BEAS response: *Until the rules surrounding the capital investment fund are finalized and clarified there are no meaningful rules to insert in our current rules. An additional comment period will be available at the time when details of the capital investment fund are proposed. No change has been made.*

2. Section 71.02 (BB) – A commenter pointed out that language defining nursing home was confusing and suggested that we cross-reference the statute and DHHS licensure regulations. Commenter #2.
BEAS response: *We will include a cross-reference to the statute and DHHS licensure regulations.*

3. Section 71.03 (A)(3) – A commenter suggested that language contained in section 329 (3) of the CON law (regarding CPI index adjustments of CON thresholds) should be incorporated into the nursing home capital expenditure section. Commenter #2.
BEAS response: *Section 329 sub-§3 applies to hospitals. No change has been made*.

4. Section 71.03(B)(6) – This section permits a critical access hospital to convert acute beds to hospital swing beds without a CON. One commenter opposed this section as it bypasses the CON process when "MaineCare funds are seriously constrained". Commenter #2
BEAS response: *This was written into statute by the legislature. See 22 MRSA § 330, sub-§7 and PL 03 Chap621. No change has been made.*

5. Section 71.03 (F)(3)(4) – A commenter noted that substantive provisions on the subject of Rights of Directly Affected Parties to Object RE Subsequent Review, Amendments and Preliminary Analysis were moved to Section 71.05 (S)(2) and some of the old language has been edited. Commenter #2
BEAS response: *This language was edited for brevity and clarity. We believe the substance of the old provisions remains. The commenter did not make any recommendations for change. No change has been made.*

6.Section 71.05 (A)(3)(a) – This section removes language requiring the Department to respond to a letter of intent within 15 business days. A commenter felt that this provision was helpful in assuring a timely response. Commenter #2
BEAS response: *Circumstances may dictate a longer response time. No change has been made.*

7. Section 71.05 (B)(1) – A commenter noted that we removed the ceiling on the maximum CON fee and felt that this should be retained. Commenter #2
BEAS response: *A project in excess of $25,000,000 would be extremely complex and require extensive analysis by BEAS, BMS, Licensing and Audit. An application fee of $25,000 would not cover the cost of this analysis. 22 MRSA §337 sub-§7 requires a maximum filing fee, and this fee has been set at $1,000 per $1,000,000 of proposed capital expenditures, and the minimum is $1,000. This is consistent with the authorization provided for in statute. No change has been made.*

8. Section 71.05(B)(6) – A commenter pointed out that new language requires the applicant to pay for required advertising and felt that this should be part of the application fee. Commenter #2
BEAS response: *The statute provides for a filing fee, but does not require that the Department pick up the cost of advertising. We feel that it is appropriate for the applicant to cover the costs of advertising required for their project. No change has been made.*

9. Section 71.05(G) – A commenter had several concerns regarding language surrounding the conduct of a public hearing. In particular the commenter expressed concerns about a) the elimination of language requiring a preliminary analysis be made available before a public hearing b) the elimination of provisions requiring the public hearing be held within 20 days unless the applicant agrees to a longer time frame and c) the elimination of a prior rule permitting reasonable questioning at a public hearing. Commenter #2.
BEAS response: *a) All the information pertaining to the application may not be known prior to a public hearing. The preliminary analysis would be incomplete and inaccurate if it were prepared prior to the hearing. b) The 20-day time frame will be utilized unless the applicant, the persons requesting the public hearing and the Department decide on a longer timeframe. c) The public hearing is a forum for public discussion and comment on the merits of the application, and is not an administrative or adjudicatory process. No changes were made.*

10. Section 71.05(H) – As noted above a commenter feels that the preliminary analysis should be made available prior to a public hearing. Commenter #2
BEAS response: *As noted above all the information pertaining to the application may not be known prior to a public hearing. The preliminary analysis would be incomplete and inaccurate if it were prepared prior to a public hearing. No change has been made.*

11. Section 71.05(N) – A commenter pointed out that the following language is not supported by statute and wants it removed: "Particular weight must be given to information that indicates that the proposed health services are innovations in high quality health care delivery, that the proposed health services are not reasonably available in the proposed area and that the facility proposing the new health services is designed to provide excellent quality health care". Commenter #2
BEAS response: *This language is contained in statute. Please see PL 03, Chapter 514. No change has been made.*

12. Section 71.05(N)(3) – A commenter expressed concern about the retention of decision criteria from prior statutes and asked that they be removed because they are obsolete. Commenter #2
BEAS response: *The intent of the new statute was to supplement and not supplant the list of criteria used to grant CON approval, and was not intended to limit the ability of the Department to determine appropriate criteria through rulemaking. The list of criteria in this section is not meant to be all-inclusive. No change has been made.*

13. Section 71.05 (N)(4)(d) and 71.05 (N)(4)(f) – A commenter questioned why limits on contingency fees were not raised to keep up with the rising costs of construction and why the limitations on moveable equipment were not increased to factor in the need for more specialized medical equipment due to increased patient acuity. Commenters: #1
BEAS response: *Contingency fees allow for unexpected construction costs up to the lesser of 5% of the construction budget or $200,000. This cap is imposed because proper planning and budgeting of construction costs can minimize unexpected expense. Moveable equipment is limited to $5,000 per bed. This limitation excludes replacement equipment and computers, printers and networking equipment. If there are unexpected changes above the permitted contingency level, the provider can request that the Department conduct a subsequent review of the revised costs. This limitation is reasonable, and the provider is able to have additional costs considered by the department, pursuant to 22 MRSA Section 331 Sub-§1. No change has been made to this section.*

14. Section 71.05 (O)(4)(d) – A commenter questioned the wording of this section which states that "Notwithstanding any of the previous subsections, no holder of a CON is entitled, <u>with</u> prior approval as specified herein, to spend in excess of the capital expenditure maximum." Commenter #1
BEAS response: *We agree with the commenter that the word <u>with</u> should be replaced with <u>without</u>. This change has been made.*

15. Section 71.05 (R) (3) – A commenter questioned the ruling which states that the Department may revoke any CON it has issued when the person to whom it has been issued fails to file on a timely basis, reports, plans or specifications required by this section. The commenter felt that this was punitive. Commenter #1
BEAS response: *The revocation of a CON would take place under only the most extreme circumstances. However the Department wishes to reserve the right to take this action when necessary, pursuant to 22 MRSA Section 346 sub-§3, which specifically authorizes the Department to withdraw the Certificate of Need when the applicant is not meeting the timetable and is not making a good faith effort to meet it. The applicant will be afforded a hearing. 22 MRSA §346 sub-§3 instructs the Department to adopt rules for the withdrawal of Certificates of Need. No change has been made.*

16. Section 71.05(N)(4)(a) – A commenter questioned the wording of our regulations regarding allowable gross square footage as compared to the statute. The statute states that the Department shall "allow gross square footage per licensed bed of not less than

500 square feet unless the applicant specifies a smaller allowance for the project." The regulations state, "Gross square footage shall not exceed 500 per licensed NF bed without justification of need". Commenter #2
BEAS response: *Verifying that the applicant is using space efficiently is an integral part of the CON approval process. Paying for excess space is an inefficient use of scarce MaineCare resources. No change was made.*

17. Section 71.05(N)(4)(b) – (j) – A commenter believes that some of the specific standards relating to CON approval are impractical and too detailed. The commenter feels that several of these standards impose unreasonable requirements and unreasonably impinge upon the business judgment of applicants. A list of the issues and comments submitted by Commenter #2 follow:
(4)(b): The regulations stipulate that only the minimum amount of land necessary to satisfy the local requirements … or to situate the building and provide adequate parking. The commenter feels that this standard inhibits nursing facilities from purchasing and developing land necessary for future expansions.
(4)(c): The regulations preclude approval of design fees that exceed the State of Maine fee schedule. The commenter wants to clarify whether this standard limits the dollar value of this expense that may be approved for purposes of future MaineCare reimbursement or if it is an absolute prohibition that would cause a CON to be prohibited.
(4)(d): The commenter wonders whether the thresholds on contingency fees are absolute bars, or purport to limit the amount of contractor fees that may be incorporated into the reimburseable base. The commenter is confused by the language requiring the contingency fee be kept "to a minimum" and requests clarification. Will contingency fees within the range be permitted or will the BEAS reserve the right to adjust contracts that have been negotiated on an arms length basis.
(4)(e): Is the disallowance of developer fees related only to the disallowance of these fees for reimbursement purposes?
(4)(f): The commenter is concerned that replacement equipment is not subject to review under the statute and can not be made subject to review by the regulation.
(4)(h): Reviewing an entire project against overall square footage standards based upon Marshall and Swift Valuation Services maybe problematic to certain kinds of facilities that seek to renovate or build particular types of units, such as Alzheimer units. The commenter suggests that this language be modified.
(4)(j): The language regarding the goal of providing reasonable staffing hours based upon size and patient mix needs to be modified because there is no historic track record on which to build the case mix estimates.
A list of BEAS responses to the above comments follows:
(4)(b): This provision is intended to ensure that only a reasonable and necessary amount of land is purchased to accommodate the project under review. Land purchased for future development should not be included in the CON application, and if included, will be disallowed.
(4)(c): This provision is intended to limit the amount of design fees that are reimbursable under MaineCare. Should the applicant exceed the MaineCare limitation they must pay for the excess with non-MaineCare dollars.

(4)(d): The contingency fee limitation is based on the dollar amount that MaineCare will reimburse. Proper planning and budgeting of construction costs should keep contingencies to a minimum. BEAS cannot adjust contracts that have been negotiated on an arms length basis between independent parties but it will limit the amount of these contracts that are MaineCare reimbursable.
(4)(e): The disallowance of developer fees relates only to the disallowance of these fees for reimbursement purposes.
(4)(f): Replacement equipment is not subject to CON review because this equipment is replacing existing equipment. The applicant has already justified the need for this equipment before it was purchased or the allowability of the purchase was verified at audit.
(4)(h): The Marshall and Swift Valuation Services provide a guideline to evaluate square footage and cost standards. The applicant may be able to justify higher square footage needs.
(4)(j): Again this standard is a guideline, individual applicants may be able to justify a higher staffing need.

18. Section 71.05(S)(2) – A commenter pointed out that there are some missing words in this section. Commenter #2.
BEAS response: *This language will be corrected*.

19. Section 71.05(S)(12) – A commenter requested that BEAS restore its prior practice of issuing a monthly list of pending projects and letters of intent. Commenter #2
BEAS response: *We have already begun issuing monthly reports to a list of interested parties.*